



SO ORDERED.

SIGNED this 01 day of November, 2004.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
CRAIG M. ROSS)	Case No. 03-42343
)	
Debtor.)	
_____)	
)	
AUDREY PULLEN,)	
f/k/a AUDREY ROSS)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7127
)	
CRAIG M. ROSS)	
)	
Defendant.)	
_____)	

**MEMORANDUM AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS**

This matter is before the Court on Defendant's Motion to Dismiss Adversary Complaint or in the Alternative for Judgment on the Pleadings.¹ Plaintiff, who is now pro se, failed to respond to the Motion to Dismiss, so the Court sent her a letter September 14, 2004, giving her additional time to respond, and reminding her of the provisions of D. Kan. Rule 7.4.² She has failed to respond, and therefore the Court considers this matter uncontested. This is a core proceeding over which the Court has jurisdiction.³

I. FINDINGS OF FACT

During the course of their marriage, the parties jointly entered into a consolidated guaranteed student loan with Nebraska Higher Education Loan Program. The consolidated loan combined certain student loan debts of both parties. The parties obtained a divorce on January 26, 1998, and as part of the property settlement in that divorce, Debtor agreed to repay the consolidated student loan debt, for which both parties were liable.

Debtor filed his petition for relief under Chapter 7 on August 20, 2003, and then filed an adversary proceeding against the student loan lender seeking a discharge of the student loan debt pursuant to 11 U.S.C. § 523(a)(8).⁴ That adversary proceeding was dismissed, without prejudice, on January 12, 2004, and has not been re-filed. Plaintiff initiated this adversary proceeding November 21, 2003, before

¹Doc. 25.

²D. Kan. Rule 7.4 provides that "[i]f a respondent fails to file a response within the time required by Rule 6.1(e), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice."

³28 U.S.C. § 1334 (jurisdiction) and 28 U.S.C. § 157(b)(2) (core proceeding).

⁴All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

conversion, seeking a determination that the student loan debt was non-dischargeable under §§ 523(a)(8) and (15).

The underlying bankruptcy case was converted to a Chapter 13 proceeding on May 25, 2004. Thereafter, Debtor filed this Motion to Dismiss. Although this Court could grant the Motion to Dismiss on the basis of Plaintiff's failure to respond, the Court will consider the merits.

II. STANDARD OF REVIEW

Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into all adversary proceedings. To prevail on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate beyond a doubt that there is no set of facts in support of plaintiff's theory of recovery that would entitle the plaintiff to relief.⁵ All well-pleaded allegations will be accepted as true and will be construed in the light most favorable to the plaintiff.⁶

III. CONCLUSIONS OF LAW

Plaintiff filed this adversary proceeding seeking, in part, a determination that Debtor is not entitled to discharge the student loan debts pursuant to § 523(a)(8). Section 523(a)(8) excepts from discharge debts incurred for an educational loan "unless excepting such debt from discharge would impose an undue

⁵*Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas*, 927 F.2d 1111, 1115 (10th Cir. 1991).

⁶*In re American Freight System, Inc.*, 179 B.R. 952, 956 (Bankr. D. Kan. 1995).

hardship on the debtor or the debtor's dependants.”⁷ The debtor bears the burden of bringing an adversary proceeding and proving that repayment of the student loans would constitute an undue hardship.⁸

Although Debtor did originally file an adversary proceeding seeking a discharge of his student loans, a joint stipulation of dismissal was entered in that adversary proceeding, and there is no indication that Debtor will raise the issue again. Because Debtor is thus not seeking a discharge of the student loan debt at this time, Plaintiff's attempt to bring the issue before the Court is not ripe. The Court will not issue what would, in essence, be an advisory opinion on the dischargeability of this debt. Therefore, the Motion to Dismiss Plaintiff's § 523(a)(8) claim is granted.

Plaintiff also seeks a judicial determination that the debt is non-dischargeable pursuant to § 523(a)(15). This part of the Complaint was appropriate when the case was proceeding under Chapter 7, because debts incurred as a result of a divorce or property settlement that are not in the form of alimony or child support are generally non-dischargeable, with certain exceptions, in Chapter 7 bankruptcy proceedings pursuant to § 523(a)(15). However, § 523(a)(15) is not applicable to cases filed pursuant to Chapter 13. When Debtor converted to a Chapter 13 proceeding, this cause of action was subject to dismissal, since debts that fall under § 523(a)(15) are dischargeable in a Chapter 13 bankruptcy, if the plan is confirmed and a discharge is received.⁹

⁷11 U.S.C. § 523(a)(8).

⁸*In re Boyer*, 305 B.R. 42, 57 (Bankr. D. Kan. 2004).

⁹*In re Dewey*, 223 B.R. 559, 566 (10th Cir. B.A.P. 1998) (stating that “[i]n a Chapter 13 case, the debt described in § 523(a)(15) is not a nondischargeable obligation under § 1328(a)(2), nor is it a priority obligation required to be paid under § 1322(a)(2),” and “[t]he only relevance the existence of § 523(a)(15) debt has in relation to confirmation of a Chapter 13 plan is in the determination of whether the Chapter 13 plan has been proposed in good faith as required by §

Plaintiff did not object to confirmation of Debtor's plan, and it was confirmed. It was at confirmation that Plaintiff should have objected to the potential discharge of her debt for bad faith. Because Plaintiff cannot state a claim under § 523(a)(15) in this Chapter 13 proceeding, Defendant's Motion to Dismiss on this claim is also granted.

IV. CONCLUSION

The Court finds that the Defendant's Motion to Dismiss should be granted. Plaintiff has failed to respond to the Motion to Dismiss, and the time for doing so has now expired. Therefore, the Court has considered the Motion to Dismiss as unopposed, and grants it on that basis. In addition, the Court finds that the Motion to Dismiss should also be granted on its merits, as set forth above.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Defendant's Motion to Dismiss Adversary Complaint (Doc. 25) is granted. This adversary proceeding is dismissed, without prejudice, in its entirety.

IT IS SO ORDERED.

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1325(a)(3)"); *In re Fussell*, 303 B.R. 539, 546 (Bankr. S.D. Ga. 2003) (holding that § 523(a)(15) is not applicable to a Chapter 13 case, because § 1328(a)(2) excepts § 523(a)(5) debts from discharge, but it does not except § 523(a)(15) debts from discharge, and further holding that if for any reason case is converted to Chapter 7, then a § 523(a)(15) issue will arise based on the then current ability of the parties to pay these debts).